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No. 93-1941

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

NISQUALLY INDIAN TRIBE, PETITIONER

v.

CULLEN AND CULLEN, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. THIS COURT'S DECISION IN *O'MELVENY V. F.D.I.C* NECESSITATES REVIEW OF THE LOWER COURTS' FAILURE TO ADDRESS FEDERAL POLICIES IN LIGHT OF APPLICABLE STATE AND FEDERAL LAW

Subsequent to the Tribe's submission of its petition for writ of certiorari but prior to the firm's brief in opposition, this Court rendered its decision in *O'Melveny v. F.D.I.C*, (to be reported at: 114 S.Ct. 2048) No. 93-489, slip op. (June 13, 1994). *O'Melveny* bears directly on this case. The firm chose not to address *O'Melveny*, though the Tribe had briefed the Ninth Circuit decision in its petition. Tribe's Petition, p. 25.

O'Melveny was a state-law cause of action brought in federal district court under California's attorney malpractice law. Here we have an ancillary attorney lien proceeding in federal

district court initiated by the Cullen & Cullen law firm under state procedural statutes. Revised Code of Washington §§ 60.40.010-030, Tribe's Petition, 12-13. The lien proceeding is ancillary to a federal cause of action and involves the res of a trust created by settlement contracts between the Tribe and the cities. The trust funds are comprised of payments derived from utility rate payers, both for settlement of tribal damage claims brought under the Medicine Creek Treaty of 1854, 10 Stat. 1132, and fishery mitigation funding to satisfy the cities' hydroelectric licensing requirements under the Federal Power Act in on-going proceedings before the Federal Energy Regulatory Commission. 16 U.S.C. §§ 797(e) & 808. Thus, the federal rule of decision for valuing damages under federal statutes, as enunciated in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), is perfectly suited for this case. *See* Tribe's Petition, 29.[1]

O'Melveny reaffirmed that "'[t]here is no federal general common law,' *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)." Slip Op. at 3. A precondition to that rare situation where a federal rule of decision will be called upon to override state law is where there is a "'significant conflict between some federal policy or interest and the use of state law.' *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)." Slip op. at 5. "As matters stand, however, federal judges must do their best to estimate how the relevant state courts would perform their lawmaking task, and then emulate that sometimes purely hypothetical model." Slip. op. at 7 (Stevens, J.,

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[1] The firm continues to distance itself from *Jones*. Firm Opp., 18-19. This despite the fact that it was the firm's own economist, in his affidavit submitted with the firm's reply brief before the District Court, who claimed *Jones* served as authority for his method of economic analysis. CR 309, 3. The Tribe then argued the case at its first opportunity and even provided the District Court with a copy. CR 314, 6-7. The lower courts ignored *Jones*.

concurring, joined by Blackmun, J., O'Connor, J., and Souter, J.).

The Tribe does not seek a new federal rule of decision that will displace or alter state law, unless this Court finds the lower courts' interpretation of state law is correct. The Tribe asks this Court to review the grave injustice as a result of the lower courts' cursory treatment of the record and the law, both federal and state. What is needed here is guidance from the Supreme Court that if attorneys are to invoke the equitable power of federal courts against the interests of their clients they must be prepared to demonstrate that they satisfied their fiduciary duties of full disclosure. These are mixed-law questions. The fiduciary duties of full disclosure under state law may not frustrate the federal statutes involved, and the extent of the disclosure required will vary depending upon the nature of the structured settlement and the relative sophistication of the parties.

II. THE LOWER COURTS' MISAPPLICATION OF STATE LAW FRUSTRATES THE FEDERAL INTERESTS THAT WERE NOT CONSIDERED

The firm argues that "[n]o issue of great public importance is presented" here and that "[t]he lower court rulings rest almost entirely on the facts of this particular case rather than on any new or remarkable pronouncement of law." Firm Opp., 1. In fact, there are three distinct federal interests of great importance that the Tribe has advanced throughout these proceedings: (1) the calculation of attorney contingency fees based in part on public fishery mitigation funding required for FERC licensing under the Federal Power Act (16 U.S.C. §§ 797(e) and 808, Tribe's Petition, 3-5); (2) the fixing of attorney fees under federal statutes designed to protect Indian tribes (25 U.S.C. §§ 82 and 476, Tribe's Petition, 8-11), and (3) the use by attorneys of the equitable power of federal courts against the interests of a client.

The lower courts failed completely to address these federal interests. In addition, both courts reached the remarkable

conclusion that Washington law did not require the attorneys to advise their client, when fixing fees, that both the attorneys and the adverse parties had a self-interest to maximize the values of the structured settlements or that the client should have sought independent economic advice.

The firm claims the Tribe's assertion that the District Court held the attorneys had no duty of full disclosure in fixing their fees "mischaracterizes the lower court rulings" and that "the District Court made no such holding." Firm Opp., 10-11. However, the decision of the District Court, which the firm now describes as "thorough", disposed of the duty question in only two sentences. District Court Order, Tribe's Petition, 12a-13a. The Tribe had advanced below that the duty arose under federal statutes, the attorney contracts, bar rules and several Washington cases, including, for example, *Kane v. Klos*, 50 Wash.2d 778, 314 P.2d 672 (1957), which held the client "must be apprised of all material facts and as well of their legal effect" before a breach of the disclosure duty may be cured. CR 314, 11-12. Not only were most of those authorities ignored, but the three cases the court did cite were casually cast aside without any analysis.

A review of those Washington cases the District Court did cite reveals the plain error of the court's cursory rejection of the need for independent economic advice. In *Ravsten v. Department of Labor and Industries*, 108 Wash.2d 143, 736 P.2d 265 (1987), the Washington Supreme Court held that payment of contingency fees must be based on actual present value of the structured settlement. 736 P.2d at 274. In *Perez v. Pappas*, 98 Wash.2d 835, 659 P.2d 475 (1983), the same court held that present value must be calculated using discount rates "based on a variety of figures best understood by economists". 659 P.2d at 480; *cf.* Firm Opp., 11 n. 2.

In *Perez*, the attorney asked his brother, an economist, to calculate the present value of the structured settlement for the client. He based his fees on his brother's value calculation. The client consulted another economist who determined the value was inflated, whereupon the two economists met and mutually agreed upon a lower figure. The client was reimbursed and then

brought suit for return of amounts paid the attorney. The Washington Supreme Court properly held that there was an accord and satisfaction based upon the express agreement after "full revelation." 659 P.2d at 480.

Here the Tribe never had independent advice and upon its request that its attorneys explain how the values were determined, the firm refused and responded "do your own calculation". CR 284, Exh. 20, 230. Furthermore, under the Tacoma agreement, according to Kevin Lyon of the firm, Tacoma's engineers did the calculations with the lawyers' participation. CR 235, 9-10. So not only were the calculations performed by self-interested parties, Tacoma and the lawyers, but they were not even performed by economists as required by Washington law.

The Court of Appeals did not even address the duty question as to the value calculations when the firm exacted it fees. Tribe's Petition, 3a-4a. Instead, the court noted that an ethical rule (WRPC 1.5(c)) requires that attorneys explain the basis for fee calculations, and then the court suggested that the post hoc valuations of the firm's economist retained for the lien proceeding satisfied that ethical duty. Tribe's Petition, 3a-4a.

The Court of Appeals also held that "the Tribe has admitted that the figures were correct". *Id.*, 3a. But the concept of "admissions" is not found in the extensive body of Washington law dealing with fiduciary duties of attorneys to make full disclosures to their clients. *See* Tribe's Petition, 26-27. Rather, it is found in Washington's law of car repair as stated in the case found in footnote 1 of the appellate court's memorandum (Tribe's Petition, 3a-4a n. 1): *Northwest Motors, Ltd. v. James*, 118 Wash.2d 294, 822 P.2d 280, 286 (1992).

The *James* case dealt with an automotive repairman's defense of "account stated" when the customer later challenged a repair bill the customer had paid. But even the defense of "account stated"---an affirmative defense that the firm never raised---would not relieve the attorneys of their fiduciary duties of full disclosure:

> The Restatement of Contracts defines an "account stated" as "a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor." *It does not itself discharge any duty*, but is an admission by each party of the facts asserted and a promise by the debtor to pay according to its terms.

James, 822 P.2d at 284 (emphasis added).

The Court of Appeals overlooked the fact that not one of the 14 Tribal witnesses deposed by the firm in this proceeding testified that they understood the damage/mitigation distinction under the settlements. Also overlooked was that none of the four Business Committee members who were asked to pass the firm's Resolution 6-1990 were involved in the cities' present value calculations. They all were elected to office after settlement with Tacoma, and were led by the attorneys to believe the Tribe was obligated to use Tacoma's present value figures to set attorney fees. Tribe's Petition, 21-22.

The firm argues that the "District Court ruled against the Tribe, not on the basis of any holding that no duty existed, but instead because there was no evidence that the duty had been breached." Firm Opp., 11. In fact, the District Court found no duty, which is why it found no breach. The lower courts failed to recognize the coercive nature of the Tribe's passage of Resolution 6-1990, which the firm drafted. The Tribe had committed in the Tacoma agreement to carry on operations and maintenance of the federal hatchery with funds paid under section 3 of the agreement. Tribal law was drafted by the firm to prohibit the use of those funds to pay attorney fees, so only "unrestricted funds" secured under Section 2 of the agreement could be used for fees. Nisqually Ordinance No. 1989-1, Chapt. XI, Tribe's Petition, 14. Then the firm filed a lien in District Court claiming $1.78 million in fees from both damage funds and hatchery funds in the firm's possession. Those are the circumstances under which the Tribe approved the firm's resolution. Such conduct by attorneys has been condemned under Washington law as a form of "economic coercion." *Ross v. Scannel*, 97 Wash.2d 598, 606, 647 P.2d 1004, 1008 (1982).

The District Court relied exclusively on the deposition testimony of Dorian Sanchez, Tribal Chairman, for the proposition that the Tribe fully understood at the time of the Tacoma agreement, 1987, that the city's present value figures would serve as the basis upon which the attorneys would be paid their fees. Tribe's Petition, 13a. But it is undisputed that Dorian Sanchez was not on the Business Committee and was not even involved in the negotiations with Tacoma. He was therefore not a competent witness on the issue of what the Tribe understood at the time of the Tacoma Agreement, as reflected in his own testimony:

Question:	And as Tribal chairman, looking again at [Resolution No. 6-1990], you would agree that you would use, or the business committee should use that negotiated settlement figure to determine what the attorneys' fee would be?
Answer:	That's correct, that's what was in the settlement.
Question:	You mean that's what the Tribe's position with respect to the settlement was?
Answer:	Yeah, when they adopted the settlement.
Question:	When they adopted the settlement?
Answer:	Yeah, previous council prior to me.

CR 299, D. Sanchez Tr. 52. In fact, the record reveals that the Business Committee members present at that 1990 meeting were led by the firm to believe the Tribe was obligated to use Tacoma's $15.6 present value figure for purposes of fixing the fees. CR 289, ¶ 11, 4-5; CR 286, ¶ 4, 2-3; CR 288, ¶ 4, 2-3. That is why Resolution 6-1990 did not deviate from the $1.78 million claim the firm first made when it filed its lien in October of 1989.

In addition to the duty of full disclosure under state law, the attorneys here breached their duty under federal statutes to make concomitant disclosures to the Federal Government. Tribe's Petition, 8-11. When Kevin Lyon of the firm requested

retroactive federal approval of the firm's 45 percent fee increase, he did not explain to the Federal Government either what he would be claiming or how the fees were to be calculated. CR 284, Exh. 2, 25-29. A mere week later Lyon filed his first lien claiming $1.78 million in fees. CR 284, Exh. 4, 136.

III. THE FIRM SEEKS TO DIVERT THE COURT'S ATTENTION AWAY FROM THE DUAL PROCEEDINGS INVOLVING HYDROELECTRIC LICENSING BEFORE FERC

The lower courts and the firm ignored the significance of the FERC proceedings. Firm's Opp., 1. But it was because of those proceedings that the Federal Government made the attorneys revise their contingency fee contracts. Tribe Petition, 19-20. It was because of those proceedings that the attorneys demanded a 45 percent fee increase two years into their 10-year contract of 1979. *Id.*, 20. It was the FERC statutes that created the duty for the city hydroelectric operators to provide for fishery mitigation, enhancement and protection. 16 U.S.C. §§ 797(e) & 808(a), *id.*, 3-5. The fisheries measures contained within these complex settlement contracts are designed to address the cities' mitigation duties, and it is the on-going FERC proceedings that will give those measures life.

The firm claims without detail that the Tribe's agreement with Tacoma contained nothing but benefits to the Tribe, including "large cash payments." Firm's Opp., 3. The firm's economist rested his entire theory on that false assumption when he performed his post hoc calculations. CR 236, ¶ 5, 2-3; *cf.* CR 303, ¶¶ 15-21, 9-12. The lower courts succumbed to that illusion of simplicity. Court of Appeals Memorandum and District Court Order, Tribe's Petition, 3a-4a, & 12a-14a. But the firm's simplistic characterization of these complex agreements fails to address, in addition to the damage recoveries, the concomitant obligations the Tribe assumed under both agreements to carry out FERC-related mitigation measures on behalf of the cities. The agreements require closer scrutiny.

Under Section 3 of the Tacoma agreement, for example, the Tribe was to be paid five annual installments of $250,000 for Tribal expenditures on "fishery related projects." CR 284, Exh. 2, 86-87. Despite the limitation as to Tribal use for these funds, Dr. Charles Pace, the Tribe's independent economist hired after the firm's refusal to account, assigned these payments a dollar-for-dollar recovery value, reduced to actual present value based on a discount rate. CR 284, Exh. 1, 10-11. The firm's economist agreed Dr. Pace's discount rates were proper. CR 309, ¶ 2, 2. The undisputed value assigned to these damage payments was thus $1,178,921. CR 284, Exh. 1, 11. But Dr. Pace also considered the mitigation funding under Section 2 of the Tacoma contract, described *infra*, and determined total Tribal recovery to be $2,457,750 under that agreement. *Id.*, 8. It was out of that structured recovery that the attorneys claimed their first $1.78 million in fees in October of 1989, $715,000 of which, plus costs, already has been paid and is not disputed. CR 213.

Under Section 2 of the agreement Tacoma is to fund, contingent upon reissuance of its FERC license, the operations and maintenance costs of the federal fish hatchery at Clear Creek, a tributary to the Nisqually River, on lands secured by the Tribe. CR 284, Exh. 2, 81-85; CR 306, 3-4. The hatchery funding is to satisfy in part Tacoma's obligation under the Federal Power Act to provide for the "protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)". 16 U.S.C. §§ 797(e) & 808, Tribe's Petition, 4-5. Tacoma and the Tribe agreed that the "reasonable annual cost of [operations and maintenance] for the Clear Creek project equals the base amount of $435,000 (1988 dollars)." *Id.*, 81.

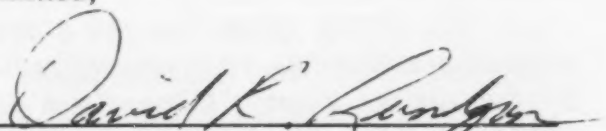
Dr. Pace's exhaustive and generous calculations, with supporting authorities, were summarily dismissed in one sentence by the district court: "[T]he Court is unpersuaded by the affidavits of Dr. Charles Pace who estimated the value of the settlements to be about one-fifth of the value originally assessed by the Tribe and the cites." District Court Order, Tribe's Petition, 13a. The Court of Appeals made no mention of Dr.

Pace's analysis, but summarily concluded in one sentence that the post hoc valuations of the firm's economist were correct. Court of Appeals Memorandum, Tribe's Petition, 4a. The Court of Appeals focused only on cash payments by relying on the concept of "gross recovery" under a state case, *Luna v. Gillingham*, 57 Wash. App. 574, 789 P.2d 801, *rev. denied*, 115 Wash.2d 1020, 802 P.2d 125 (1990). Court of Appeals Memorandum, Tribe's Petition, 2a. But such reliance was misplaced.

First, the gross-recovery concept of *Luna* deals with whether litigation costs are deducted prior to assigning a present value to the recovery for purposes of fixing attorney contingency fees. That concept has nothing to do with determining what was recovered. In fact, the Federal Government also specifically required the attorneys to amend their contracts with the Tribe so that costs would be deducted and paid before the net recovery is valued. CR 284, Exh. 45, 323-24 & ¶ VIII, 336.

Secondly, reliance on the gross-recovery concept was misplaced because it fails to account for the FERC-related mitigation measures and the well-settled economic principal that "costs must be considered" in calculating actual present value of recovery. *Jones*, 462 U.S. at 534; *see Ravsten*, 736 P.2d at 274 (1987)(holding that "marketplace cost" must be considered in determining actual present value of structured settlements). The parties to these settlement agreements expressly agreed that the mitigation funding was to cover reasonable costs incurred by the Tribe to carry out the cities obligations. CR 284, Exh. 2, 81-82 (Tacoma agreement); CR 284, Exh. 15, 208-209 (Centralia agreement).

Respectfully submitted,



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